

CITATION: Turk et al. v. Turk et al., 2011 ONSC 6497

COURT FILE NO.: 08-04/11

DATE: 20111107

ONTARIO

SUPERIOR COURT OF JUSTICE

ESTATES LIST

IN THE MATTER OF the Marin Huston Trust established pursuant to a Settlement dated July 17, 1992 and made between Sandra Turk as Settlor and Harvey S. Consky as Original Trustee (the "Marin Huston Trust") and of the J.D.H. Trust established pursuant to a Settlement dated May 2, 1996 and made between Sandra Turk as Settlor and Jonah Turk as Original Trustee (the "JDH Trust")

BETWEEN:

MARIN RACHEL TURK and GREGORY
HUSTON TURK,

Applicants

– and –

JONAH TURK, NORMAN TURK,
ROBERT MICHAEL SILVERSTEIN
TURK LAWSON, BRONTE GABRIELLE
SILVERSTEIN TURK LAWSON and THE
CHILDREN'S LAWYER,

Respondents

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)
) *Timothy Youdan and Sarah Weingarten,*
) Counsel for the Applicants
)
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) *Benjamin Zarnett and Alexa Abiscott,*
) Counsel for Jonah Turk as Trustee
)

) *Archie Rabinowitz and David Lobl,* Counsel
) for Robert Michael Silverstein Turk Lawson
) and Bronte Silverstein Turk Lawson, two of
) the Respondents
)

) *Jules Berman, Q.C.,* Counsel for
) Norman Turk, a Respondent, in his role as
) Advisor to the two Trusts
)

) **HEARD: OCTOBER 6, 2011**

ENDORSEMENT: GREER J.:

[1] Sandra Turk ("the Settlor") settled two family trusts for the benefit of her two grandchildren, Marin Rachel Turk and Gregory Huston Turk, and other beneficiaries as outlined in the Trust Agreements. The first Settlement made July 17, 1992 was between the Settlor and Harvey S. Consky as Original Trustee. It is referred to as (the "Marin Huston Trust"). Four

years later, the second Settlement was made May 2, 1996, by the Settlor and Jonah Turk, her son, as Original Trustee. It is referred to as (the "JDH Trust").

[2] Jonah Turk ("Jonah") was married on December 30, 1984 to Susan Turk. There were two children of the marriage, namely Marin Rachel Turk ("Marin"), born October 3, 1985 and Gregory Huston Turk ("Gregory") born February 21, 1988. Marin is now 26 years of age and Gregory is 23 years of age. Jonah and Susan Turk were divorced on August 10, 2008.

[3] Jonah, on August 12, 2008, married Heather Lawson (now "Heather Turk"). She brought two children into their marriage, namely Bronte Gabrielle Silverstein, (now Bronte Gabrielle Silverstein Turk Lawson) ("Bronte"), born July 26, 1991 and Robert Michael Silverstein, (now Robert Michael Silverstein Turk Lawson), ("Robert"), born October 15, 1992. At the time of the hearing of this matter, Bronte was 19 years of age and Robert was 18, although he turned 19 a few days later.

[4] Jonah adopted both Bronte and Robert on June 21, 2010 when Bronte was 18 years of age and an adult. Robert was then 17 years of age. and a minor at the time.

[5] An issue has arisen among the parties as to which of these children, if any, are beneficiaries of the two Trusts settled by Sandra Turk.

[6] The parties, for the benefit of the Court and counsel, filed a Statement of Agreed Facts.

The Marin Huston Trust

[7] The first preamble of this Trust reads:

WHEREAS the Settlor desires to establish a trust to be known as the MARIN HUSTON TRUST, for the benefit of the family of her son JONAH TURK (herein called "Jonah Turk") and their issue as hereinafter provided.

Part I, subparagraph 1.1.4 of the Trust defines "Jonah's Family" as follows:

"Jonah's Family" at any time means those who are alive at that time of Marin Rachel Turk, Gregory Huston Turk and any other children of Jonah Turk born after the date of this Settlement, and the issue of such children.

Subparagraph 1.1.5 speaks to the "time of division" under the Trust. It is the earlier of:

- (a) The date which is one day prior to the twenty-first anniversary of the death of the last survivor of those of Jonah's Family who are alive at the date of this Settlement, and

- (b) Such date as the Trustees and the Advisor may determine by instrument in writing signed by each of them and delivered in counterparts to every member of Jonah's Family who are alive at the time of the signing of such instrument is alive and has attained the age of majority.

[8] The "Meaning of Issue" is defined in paragraph 1.2 as follows:

Any reference in this Settlement to a person in terms of a relationship to another person determined by blood or marriage shall not include a person born outside marriage nor shall it include a person who comes within the description by tracing through another person who has been born outside marriage, provided that:

- A. any person who has been legally adopted shall be regarded as having been born inside marriage to his or her adopting parents,

[9] The purpose of the Trust is set out in part II, paragraph 2.1. It is said, among other things, to hold the common shares of Marin Huston Land Corporation as a means for investing in real properties and business interest for the "benefit of Jonah's Family", including interest in any business ventures or real properties in which Jonah Turk or one or more members of Jonah's Family may have an interest.

[10] Part V, paragraph 5.1, sets out an alternative distribution if there are no members of Jonah's Family alive at the time of division. The Trustees are then directed to divide the trust fund among the issue of the Settlor or such one or more members of them to the exclusion of the other or others and on such terms and conditions as the Advisor in his uncontrolled discretion may any time and from time to time in writing either revocably or irrevocably appoint without in any way infringing any rule against perpetuities.

[11] Part XI allows for a Variation of the Settlement as follows:

The terms of this Settlement may be altered, amended or varied at any time and from time to time by an instrument in writing signed by:

- (i) the Advisor,
- (ii) at least two-thirds of the members of Jonah's Family who at that time are living and have attained the age of majority, and

- (iii) a majority of the Trustees on behalf of the infant, unborn and unascertained beneficiaries.

provided that no alteration, amendment or variation may be made this Settlement which results in a benefit being bestowed upon either of Norman Turk and the Settlor.

The J.D.H. Trust

[12] This Trust was settled on May 2, 1996, nearly 4 years after the earlier Trust. On the date of settlement, Jonah's and Susan's only children born to them, and alive then, were Marin and Gregory.

[13] The above paragraphs of the Marin Huston Trust mirror those of the J.D.H. Trust. The only difference is that this Trust was set up to hold the "common shares of JTHT Holdings Inc." This is also said to be a means for investing in real properties and business interest for the "benefit of Jonah's Family" including interests in any business venture or real properties in which Jonah Turk or one or more members of Jonah's Family may have an interest.

Distribution under the Trusts

[14] The "time of division" is set out in both Trusts, as noted above. The Trustee may, under Section 1.2 of the Trusts, make payments of income and capital before the time of division to "Jonah's Family" in such proportions and to the exclusion of others as the Trustee may determine to be appropriate.

[15] The Advisor, after the time of division, may exercise a power of appointment under Section 4.1 of the Trusts, to divide and distribute the income and capital of the trust funds to "Jonah's Family" in such proportions and to the exclusion of others in his uncontrolled discretion.

[16] If, after the time of division, the Advisor has not exercised a power of appointment or (if the appointment is invalid), under Section 4.2, the Trustee is directed to divide the trust fund into such number of equal shares in respect of each child of Jonah Turk living at the time of division and divide one of such shares in equal shares per stripes amount the issue alive at the time of division of each child of Jonah Turk who has died prior to the time of division.

[17] Finally, in Section 5.1, if there are no members of Jonah's Family alive at the time of division, provision is made for the trust fund to be divided among the issue of the Settlor or such one or more members of them to the exclusion of the others as the Advisor in his uncontrolled discretion may appoint and in the absence of such appointment the Trustee shall divide the trust funds among persons who would be entitled thereto as if Jonah Turk had died at the time of division intestate, unmarried and without debts and the trust funds were the only asset of his estate.

The positions of the parties

[18] Jonah's two children from his marriage to Susan, namely Marin and Gregory, come before the Court as Applicants to have the terms of the Trusts interpreted. Upon Jonah's remarriage after their parents' divorced, Jonah adopted Bronte and Robert, the two children of his new spouse, Heather. Neither child was an infant nor a young child at the time of the adoption. Bronte was an adult and Robert within a year of attaining the age of majority.

[19] Marin and Gregory are Jonah's natural born children and the only named beneficiaries of the Trusts. The other beneficiaries of the Trusts are unnamed and are said to be "...any other children of Jonah born after the date of this Settlement."

[20] All parties agree that Robert is a beneficiary of the Marin Huston Trust since he was born on October 15, 1992, being a date after that Trust was settled on July 17, 1992. In contrast, Robert was alive after the J.D.H. Trust was settled. Bronte, however, was born on July 26, 1991, before both Trusts were settled.

[21] Marin and Gregory say that only Robert can have an interest in the Marin Huston Trust and that Bronte has no interest in it. They also say that neither Bronte nor Robert has an interest in the J.D.H. Trust.

[22] Jonah, in his personal capacity, says that both Bronte and Robert have interests in each Trust. That position is supported by Norman Turk, in his role as Advisor to the two Trusts.

[23] Jonah, in his capacity as Trustee, presented the facts in the proceeding. The Trustee's legal position is that Bronte and Robert each have an interest in each Trust. Sandra, the Settlor, takes no position.

[24] Bronte and Robert say that they are part of "Jonah's Family" because of their adoption by Jonah. They say that each qualifies to be included among the beneficiaries of the Trusts by implying the words, "or adopted" into the Trust Agreements after the word "born". They say that this makes them part of the "issue" described as beneficiaries in the Agreements.

Analysis

[25] The Court must look at not only the wording of the Trust Agreements, but must examine the legal effect of the adoption of Bronte and Robert by Jonah to determine whether either is or both are beneficiaries of the Trusts or not.

[26] Marin and Gregory, as Applicants, say that the determination of who is a beneficiary under each Trust should be made based on a reading Article 1.1.4 of each of the Trusts. They are Jonah's natural born children and are the only persons named as beneficiaries of each Trust. There is also a class of beneficiaries described as "...any other children of Jonah born after the date of this Settlement and the issue of such children".

[27] All the parties point to the fact that Jonah adopted his new wife's two children on June 21, 2010. Bronte was an adult at that time and Robert was 17 years of age, and a minor at that time. Under paragraph 1.2 of the Trusts, there is a definition of "issue", as used in the Trusts. While it excludes any person born outside marriage, subparagraph A. says that any person who has been legally adopted shall be regarded as having been born inside marriage to his or her adopting parents. All agree that Bronte and Robert were legally adopted by Jonah. The Trusts, however, do not include a provision specifying when an adopted child is said to be "born" within the meaning of the Trusts.

[28] The *Child and Family Services Act*, R.S.O. 1990, c. C-11 ("the CFS Act") is the Act governing adoption. It was operative when Bronte and Robert were adopted by Jonah. Both were adopted in Ontario pursuant to s. 158(1) of the Act. Subsection 158 (2) (a) says that as of the date of the making of an adoption order, "...the adopted child becomes the child of the adoptive parent and the adoptive parent becomes the parent of the adopted child." That child then ceases to be the child of the person who was his or her parent before the adoption order was made, except where the person is the spouse of the adoptive parent.

[29] Since Bronte was an adult when she was adopted, only Bronte had to consent to her adoption. Robert, on the other hand must have had his father's consent to the adoption, if he was alive at that date and given his age, Robert would have had to personally consent to his adoption.

[30] Subsection 158 (4) of the CFS Act makes reference to Wills and other documents as follows:

(4) In any will or other document made at any time before or after the 1st day of November, 1985, and whether the maker of the will or document is alive on that day or not, a reference to a person or group or class of persons described in terms of relationship by blood or marriage to another person shall be deemed to refer to or include, as the case may be, a person who comes within the description as a result of an adoption, unless the contrary is expressed.

Therefore, once Bronte and Robert were adopted, they say they have become Jonah's children and therefore members of Jonah's Family, as defined in the Trusts.

[31] The second issue to be determined is when is an adopted child deemed to be "born" for purposes of the Trusts.

[32] It is the position of Marin and Gregory that the issue in dispute is whether the language used in the Trusts, defining who is a beneficiary, should be interpreted according to its natural meaning. In looking at the issue, they say the issue is whether:

- (a) an unnatural meaning should be given to the relevant words in Article 1.1.4 (the word "born" in the clause "born after the date of this Settlement"), so that "born" is interpreted to reference a child's date of adoption rather than birth; or
- (b) words should be implied into Article 1.1.4, so that the language "born after the date of this Settlement" is interpreted to mean "born or adopted after the date of this Settlement." (emphasis added)

They say that there is no basis for either taking an unnatural meaning of the word "born" or implying the words "or adopted" into Article 1.1.4 of the Trusts. They say that the words should be given their natural meaning, and that members of "Jonah's Family" as defined in the Trusts could only mean those persons who are "born" after the date of the Settlement. Such a meaning would therefore include Robert as a beneficiary of the Marin Huston Trust since he was born after it was settled. It would disqualify Robert from being a beneficiary of the J.D.H. Trust and would disqualify Bronte from being a beneficiary of either Trust.

[33] This meaning does not exclude Marin and Gregory, since they are named beneficiaries of the Trust, being the only natural born children of Jonah named in the Trusts and who were alive on the dates both Trusts were settled. Robert was born before one Trust was settled and after the second one was settled.

[34] They say there is no basis in the Trusts, the Ontario legislation or the facts before this Court to adopt an unnatural meaning of the word "born", as it is used in the Trusts.

[35] The Trustee says that an adopted child of Jonah should be treated the same way as his natural born children are treated under the Trusts. He says that the adoption date of Bronte and Robert should be considered the date they are born to Jonah. He says that s. 158(2) of the CFS Act stating that for all purposes of law, as of the date of the making of the adoption order, the adopted child become the child of the adoptive parent and that this date should be now considered the date of the birth of the child and not his or her actual birth date as shown on his or her birth certificate.

[36] Bronte and Robert point to Section 146 of the CFS Act, which says that an adoption Order is final and irrevocable and should not be questioned or reviewed in any way by the Court by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, *habeas corpus* or application for judicial review.

[37] They also say that the Trusts do not express an intention to exclude adopted children. They say that once the child is placed up for adoption by his or her natural parents, when the adoption takes place, that child is considered the child of the marriage of the adoptive parents. While this is true, neither Bronte nor Robert were "placed up for adoption". Bronte was an adult, as noted earlier in these reasons, and given Robert's age when he was adopted at 17 years of age. This is not the case where a child in infancy is adopted by adoptive parents.

Analysis

[38] All parties agree that there is no Canadian case law, which is on all fours with the issues in the interpretation of these Trusts. One firstly looks at the Settlor's intention as ascertained from the four corners of the Trust Settlements themselves and from the Trusts as a whole and not solely from the words used. See: James MacKenzie, *Feeney's Canadian Law of Wills*, 4th ed. Looseleaf (Markham: LexisNexis Canada Inc., 2000) at para. 10.60.

[39] *Feeney's*, also says that if a Trust Deed describes a certain person with sufficient certainty to enable a Court to recognize the person intended by the settler, the Court will overlook the inaccuracy in the rest of the description. In my view, this principle cannot apply to the Trusts in question. Such descriptions relate to a beneficiary's name, which is incorrectly spelled or misdescribed, such as a charity's name. It can also apply when a testator or settlor describes someone as "my niece Ann Smith", but that person is not blood-related to the testator or settlor and whose name is actually "Anne Smith", not the name shown in the document.

[40] I have also reviewed the wording of *Feeney's* in paragraphs 10.61, 10.62, 10.67, 10.69, 10.71, 10.80, 10.98, 11.14, 11.1, 11.12, 11.29 and 11.33. I cannot see where any of these propositions apply to the wording of the Trusts. The clause in the Trusts is worded, "...and any other children of Jonah Turk born after the date of this Settlement, and the issue of such children". There is nothing in this clause that is ambiguous or capable of two constructions. The words "born after" mean exactly what they say.

[41] Nor can I find that the Settlor's intention is not clearly expressed in the words used in the Trusts. The words "born after" cannot have any other meaning than their natural meaning. While it may be inequitable for Bronte, who is now Jonah's adopted child, not to be a beneficiary under either Trust, and Robert only the beneficiary of one Trust, their adopted status is not changed by any legislation to take away the fact that their real birth dates, for Bronte is before both Trusts were settled and Robert's before one Trust was settled.

[42] Marin and Gregory, on the other hand, could say that it would be inequitable to them and their unborn and unascertained issue, if the wording of the Trusts was to be interpreted in such a manner as to add a whole new class of persons as beneficiaries to the Trusts, who were born before the Settlement dates.

[43] There is no doubt as to the meaning of the words "born" and "after". Any natural children Jonah may have in the future, and any infants or other children he may adopt who were born after the dates of the Settlements, would be included in the class described in the Trusts. Nor can I see where the Settlor had a general intent other than what the words themselves say in the Trusts. There is no indication that she contemplated her son, Jonah, adopting adult persons or children who were almost adults and born "before" the dates of the Settlements, so that they would now be included in the classes of beneficiaries named in the Trusts.

[44] The construction of the words of the Trusts is neither unjust nor absurd nor does the rule against disinheritance apply, as outlined in *Feeney*, in para. 10.80. The words "Jonah's Family", while now including his adopted children, is not a conflicting provision to "born after". A conflicting provision must arise in the original wording of the Trust Deed, so that it is conflicting throughout the time from the Trust's settlement date to the date of the interpretation. That is not the case here. The problem only arose when Jonah adopted persons born after the dates of the Trusts.

[45] Bronte and Robert say that the Court should take an "analytical approach" instead of an objective or literal method, which looks for the meaning in the words in the Trust and not to search for the trust-maker's intention. As I have noted, there is nothing in either Trust, which would lead a Court, on a construction, to find anything other than what the words say is the Settlor's intention. There is no subjective intention shown in the Trusts.

[46] On the question of what is the Settlor's intention, I adopt the traditional view on the interpretation of trusts as summarized in Lewin on Trusts 18th ed., John Mowbray et al., (Toronto: Thomson Sweet & Maxwell, 2008) at 200-201:

Lifetime settlements are no different from other documents in that the subjective intentions of their authors are irrelevant. What counts is that the objective meaning that the words of the document convey to the court when considered as a whole in light of the surrounding circumstances.

...

The intention that the court seeks is the intention as expressed; that is, the way in which the document is to be understood, not the purpose, motive, desire or other subjective state of mind of the settlor. The reason for the rule is that, otherwise, no lawyer would be safe advising on the construction of a written instrument, nor any party in taking under it.

[47] If one looks at the extremes of what it is that the Trustee and Bronte and Robert are asking the Court to do, Jonah would then be in a position, if he got annoyed with Marin and/or Gregory, to adopt as many adults, all born after the dates of the Trusts. This would allow him or the Advisor on the date of division to appoint funds to those adoptive persons to the detriment of his own natural children and any "issue" they may have at that date.

[48] The Trustee says that the Court should adopt or apply the way the courts in the United States have addressed a similar question, as to whether children physically born to other parties before the date of a will, but adopted after, are considered children born after the date of the will for the purpose of legislation providing "after-born" children with a right of succession. In a 1918 decision, *Bourne v. Dorney*, 184 AD 476 (NY App Div 1918), the court in New York had the advantage of a statute entitled the "Decedent Estate Law", which provided for "after-born" children. Here in Ontario, there is no such legislation. In Ontario, if a dependent child is left out of a parent's Will, he or she can bring on a Dependant's Relief Application.

[49] In another United States case, *In Re Markowilz Estate*, 126 NJ Super 140 (NJ Essex Co Ct 1973), the Court dealt with the case of a child who was adopted after the making of a will. There also, in New Jersey, was a statute similar to that in *Bourne, supra*. In Ontario, where a child is adopted, regardless of the date on which he or she is born, that child becomes the child of the adopted parent. Since a Will speaks from the date of death, it "picks-up" any child adopted after the date the Will is made. In this case, however, the Trusts, by using the words, "born after" speaks from the date of the Trust itself.

[50] The Trustee also says that Marin's and Gregory's position leads to results that may be considered unreasonable, since it distinguishes between children adopted on the same date on the basis of their physical age at the date of adoption. One must, however, look at their actual birth dates to see when they were born. On their birth certificates, their birth dates remain the same despite their adoption.

[51] In Ontario, the *Vital Statistics Act*, R.S.O. 1990, Chapter V.4 deals with, *inter alia*, the registration of births in the Province. There, a "birth parent" is described in relation to an adopted person, as a person whose name appears as a parent on the original registration of birth. Adoption Orders are dealt with in Section 28 of the Act. Subsection 28(1) reads:

Upon receipt of a certified copy of an adoption order transmitted under subsection 162(3) of the *Child and Family Services Act*, or any predecessor thereof, or a certified copy of an order, judgment or decree of adoption made by a court of competent jurisdiction of another province or territory of Canada or of a foreign state, issued under the seal of the proper certifying authority, the Registrar General shall register the order, judgment or decree.

Subsection 28(3) reads:

Where a new registration is made pursuant to subsection (2), the date of the new registration shall be the date of the original registration.

Therefore, pursuant to this legislation, Bronte's and Robert's birth dates remain the same on their new birth certificates issued after adoption, as they were on their original birth certificates before they were adopted.

[52] The Children's Lawyer, although a named party, has taken no position on this matter and did not appear when the Application was heard by me. Counsel on this Application are aware that if all beneficiaries agree, and the Children's Lawyer consents, a Trust may be varied to change the wording of it to include other beneficiaries or classes of beneficiaries. No one has suggested that there is a compromise that can be made in this regard.

Conclusion

[53] Based on the reasons I have set out in this Endorsement and based on the clear and unambiguous wording of the Trusts, themselves, Bronte is not a beneficiary of either Trust, having been born before each Trust was settled. Robert, given that he was born after the Marin Huston Trust was settled, is a beneficiary under that Trust but is not a beneficiary under the J.D.H. Trust. A Declaration to that effect shall issue accordingly.

[54] The Court was asked to make a determination in paragraph 1 (d) of the Applicants' Application dated March 14, 2011 as to whether Bronte and Robert became beneficiaries of the Trusts and I have declared, as noted above, that Bronte is not a beneficiary of either Trust and Robert is a beneficiary of only the Marin Huston Trust.

Costs

[55] If the parties cannot otherwise agree that all Costs should be paid half out of the capital of each of the Trusts and agree on the amounts to be so paid, I will receive brief written submissions by the parties no longer than 3 pages plus dockets plus case law within 30 days of this Endorsement.

Greer J.

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ENDORSEMENT

Greer J.

Released: November 7, 2011